United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 76-2065

To be argued by
JESSE BERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR GATES,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

Docket No. 76-2065

B
P/S

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK,
DENYING A PETITION FOR HABEAS CORPUS.

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ARTHUR RICHARD GATES, :

Petitioner-Appellant :

-against- :

ROBERT J. HENDERSON, Superintendent, :
Auburn Correctional Facility,

Defendant-Appellee. :

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ISSUES PRESENTED

1. Whether the court below erred in holding that appellant's objections at trial, direct appeals and subsequent coram nobis petitions, relating to the introduction of the palmprint evidence, were insufficient to preserve that issue for federal habeas corpus review.

2. Whether the introduction at appellant's trial of palmprint evidence seized subsequent to appellant's arrest without probable cause, violated appellant's rights under the Fourth and Fourteenth Amendments.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Carter, D.J.), rendered May 27, 1976, denying, without a hearing, appellant's petition for a writ of habeas corpus.

Timely notice of appeal was filed and the District Court, on June 17, 1976, granted appellant a Certificate of Probable Cause and permitted appellant to prosecute this appeal in forma pauperis.

On July 6, 1976, this Court appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

B. Statement of Facts

Appellant Arthur Richard Gates was convicted in County Court, Rockland County, State of New York, on February 14, 1967, after trial by jury, of the crime of murder in the first degree and sentenced to a term of 20-years-to-life imprisonment (Silberman, J., at trial and sentence). Appellant is presently confined in the custody of respondent-appellee pursuant to that judgment.

Appellant, in his pro se petition to the District Court, sought a writ of habeas corpus on the ground that his conviction was constitutionally defective in that it was secured after introduction of evidence, to wit, palmprints, which were taken from him without probable cause in violation of his Fourth and Fourteenth Amendment rights and contrary to the Supreme Court's decisions in Davis v. Mississippi, 394 U.S. 721 (1969) and Mapp v. Ohio, 367 U.S. 643 (1961).

Appellant's trial, which lasted eight days, involved a prosectuion case built exclusively on the basis of circumstantial evidence. See opinion of the New York State Court of Appeals, People v. Gates, 24 N.Y. 2d 666, 669 (1969)(Fuld, C.J.). Included in the state's proof was palmprint evidence which the prosecution claimed tended to connect Petitioner with the crime.

Even with the introduction of this evidence, which was admitted over defense objection, the jury remained in deliberation for more than fifteen (15) hours, over the course of two days, before reaching a verdict.

(1) The Crime, Arrest and Subsequent Palmprinting and Fingerprinting of Petitioner Without Probable Cause

At approximately 1:00A.M. on the morning of September 7, 1966, Audrey Mierop, a tenant in the second floor apartment at 18 Second Avenue, Spring Valley, New York, heard unusual noises coming from the downstairs apartment, which was occupied by Patricia Gates, the petitioner's former wife. Mrs. Mierop hollered for help and ran downstairs where she met Patrolman John Sullivan, who had entered the building to investigate, outside the Gates apartment.

The officer forced open the door to Mrs. Gates' apartment and found her in her bed, bleeding and in a conscious state.

At trial, Mrs. Mierop stated:

> "I walked in and as I saw her, I said, "Oh, my God, Pat." She says, "Audrey, call my mother and my brother." I said, "Pat, who did this?" She didn't answer. I said, "Pat did Rich [Petitioner] do this?" She said, "I don't know but he wore glasses."
>
> (T. 118)*

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* "T" refers to minutes of trial, January 13, 16, 17, 18, 19, 20, 23, and 24, 1967.

Mrs. Gates then lost consciousness. She was removed to the hospital where she was pronounced dead at 1:20 A.M.

Mrs. Gates' statements to Audrey Mierop, prior to losing consciousness, clearly indicate that Mrs. Gates was lucid enough to recognize her neighbor and discern that her assailant was male and wore glasses. Notwithstanding such lucidity, Mrs. Gates did not recognize appellant as her assailant even though appellant was her former husband and even though she had been directly asked whether or not appellant was her attacker.

Appellant, although not having been named by his wife as the perpetrator, was arrested at 1:45 A.M., only 45 minutes after the attack, by Patrolman Fred Meyers of the Spring Valley Police, after being stopped by Meyers for driving with bright lights (T. 941). At the time appellant was stopped, approximately ten miles from the victim's home, he made no attempt to flee (T. 960. 960a), did not act suspiciously (T. 961), was able to produce proper identification (T. 942, 961), and his appearance was normal. He had minor cuts on his right hand, but these were not noticed by the arresting officer until much later, when they arrived

at the police station (T. 961).*

Appellant was brought to the station house in the Village of Spring Valley and an hour and a half later he was taken to the police station in Clarkstown. Meanwhile, the police at the scene of the assault had already found what appeared to be two usable latent palmprints on the window believed to have been entered and exited by Mrs. Gates' assailant (T. 419-420).

At sometime between the hours of 4:00 A.M. and 5:00 A.M., appellant was subjected to fingerprinting and palmprinting by the Clarkstown police.

Other police officials, who held appellant in custody without probable cause during that time, testified further at trial as to the condition of petitioner's hands:

> Q. Now, you have testified already here that you took palm prints of Arthur Richard Gates?

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* At trial, on direct examination, Meyers first testified that he noticed the appellant's hands at the time he pulled him over for failing to dim his lights, and noticed what appeared to be cuts on appellant's hands (T944, 945).

However, on cross-examination, Mr. Meyers indicated that he did not, in fact, notice appellant's hands until he reached the police station:

> Q. Was it at this time, sir that you say you noticed his right hand?
>
> A. No, sir. I noticed his hand in the station.
>
> Q. In other words, you didn't notice his hand at the place where you stopped him?
>
> A. No, sir.
>
> (T. 961)

A. I did.

Q. And the person that you took the palm prints of is one and the same person?

A. Yes.

Q. At that time did you have occasion to look at his hands?

A. Yes, I did.

Q. Did you look at both of his hands?

A. Yes.

Q. Could you describe his right hand?

MR. NEWMAN: (Defense Counsel) Objection, Your Honor.

THE COURT: What is the objection, Mr. Newman?

MR. NEWMAN: I think, Your Honor, that we are getting now on grounds where this defendant has some constitutional grounds which are being violated by the actions of this police officer?

THE COURT: I will take it. I will overrule your objection.

MR. NEWMAN: Exception.

THE COURT: I will take his testimony as to what he observed. Only what he observed.

MR. NEWMAN: May I have an objection, Your Honor, on the basis of constitutional grounds both state and federal Constitutions?

THE COURT: You have that objection.

BY MR. MEEHAN: (District Attorney)
Q. Captain, would you describe what you say when you looked at Arthur Gates' right hand at four or five o'clock on the morning of September 7, 1966?

A. Number one, they were shaking; number two, I noticed several cuts.

(Testimony of Captain Dwight Eisgrau, Clarkstown Police Department, T. 548-549)

The trial record is devoid of any explanation as to the probable cause for appellant's arrest and subsequent palmprinting, and appellant's claims arise from the admission in evidence of those palmprints at trial.

(2) Exhaustion of State Remedies

At trial, outside the presence of the jury, appellant's counsel objected to the introduction of the prints taken of appellant's hands by Captain Dwight Eisgrau of the Clarkstown police:

(In Chambers)

THE COURT: Mr. Newman, you inform he that you want to make an objection outside the presence of the jury.

MR. NEWMAN: Right. As I understand it, the District Attorney is about to introduce into evidence fingerprints which were taken by the present witness, Captain Eisgrau of the Clarkstown Police Department.

MR. MEEHAN: (D.A.): Did you say fingerprints?

MR. NEWMAN: Hand prints, and which were taken at the Clarkstown Police Department on the morning of September 7, 1966. While there is no question, and we will stipulate, that they were taken of the defendant in this case, we raise objection not to the fact that they are or not his prints but to the introduction of those prints on the basis that this man's constitutional rights both under the State and Federal constitution have been violated by the taking of these prints and as such we object to them.

THE COURT: Your objection is then on constitutional grounds to the mere fact of the taking of the prints?

MR. NEWMAN: Yes, sir.

THE COURT: As such?

MR. NEWMAN: Right, sir.

THE COURT: I will overrule that objection.

MR. NEWMAN: Exception.

MR. MEEHAN: Your Honor---

THE COURT: And you will have a similar objection, without having to renew it, for the record to any further introduction of prints taken of the defendant by any other law enforcement officer.

MR. NEWMAN: Fine, sir.

THE COURT: And with the same ruling.

(T. 535-536, emphasis added)

Appellant has consistently and steadfastly objected on constitutional grounds to the admission in evidence of these palmprints taken while he was illegally detained.

Appellant's conviction was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York, Second Department, People v. Gates, 29 A.D. 2d 843 (2d Dept. 1968).

Appellant, in his appeal to the New York Court of Appeals, again asserted his claim that the evidence was obtained from his arrest without probable cause and should therefore have been excluded. The Court of Appeals' opinion [People v. Gates, 24 N.Y. 2d 666 (1969)], while affirming appellant's conviction, determined that: 1) appellant's palm and fingerprints

found on the window of the deceased's home were a major piece of evidence against him at the trial and 2) that "recognizing the importance of the fingerprint evidence, the defendant urges that it should not have been received against him at the trial because he had been unlawfully arrested and the fingerprints taken while he was being illegally detained," and 3) the Supreme Court had just recently decided in Davis v. Mississippi, 394 U.S. 721 (1969), that fingerprint evidence is subject to the proscription of the Fourth and Fourteenth Amendments and that appellant's fingerprints would have been excludable from trial if procured as a result of an unlawful arrest; and 4) that appellant failed to challenge the admissibility of the fingerprints either prior to or during the course of the trial and therefore the issue was not preserved for appellate review. Nonetheless, the Court of Appeals was constrained to speculate as to the proof which the People might have offered to counter appellant's claims that there was no probable cause for his arrest and subsequent fingerprinting.

Appellant thereafter pursued this claim in the original trial court by application for a writ of error coram nobis. The writ was denied, based on the Court of Appeals' finding that appellant had waived objection at trial (People v. Gates, 61 Misc. 2d 250, County Court, Rockland County, 1969).

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* The New York Court of Appeals decision in appellant's case was rendered on May 14, 1969, only 22 days after Davis v. Mississippi, supra. The Davis decision was handed down by the Supreme Court on April 22, 1969.

Appellant appealed, from the trial court's denial of his coram nobis application, to the Appellate Division, Second Department, which ruled that he was foreclosed from making his assertions after failing to raise the issue at trial. See, People v. Gates 36 App. Div. 2d 761 (2d Dept. 1971).

Permission to appeal further to the Court of Appeals was denied in January of 1972.

Appellant subsequently petitioned the United States District Court for the Southern District of New York pro se for a writ of habeas corpus, based on the continual failure of the state courts to grant him relief with respect to the impermissibly seized evidence subsequently introduced against him at trial in violation of his constitutional rights under the Fourth and Fourteenth Amendments. In an opinion dated May 27, 1976, the District Court,(Carter, D.J.), denied the writ and dismissed appellant's petition.*

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* The full text of the opinion of the District Court is reproduced in Appellant's Appendix.

(3) The Opinion Below

On May 27, 1976, the District Court denied appellant's petition. In its ten-page opinion and order, the Court framed the threshold issue of appellant's habeas corpus petition as "whether defendant made an objection at trial sufficient to preserve the question of the admissibility of the palmprints for appellate or habeas review." (Opinion and Order of the District Court, at A-*).

The courts opinion went on further to discuss the prior state court decisions with respect to appellant's claim.

The District Court found (1) that Judge Fuld's opinion , in appellant's direct appeal in the New York Court of Appeals, held that appellant's trial counsel failed to sufficiently specify his objection, (2) that two state courts had upheld this conclusion on collateral attack, (3) that those decisions merely followed New York procedural requirements and (4) that those decisions precluded federal habeas corpus review.

It should be noted that some months prior to the District Court's decision, but after receipt of memoranda from both sides, the District Court addressed three questions to counsel for both sides in a letter dated February 10, 1976. The Court asked:

> 1. Is it true, as the portions of the record quoted by Mr. Berman seem to show,

that objection was made at trial to the admission of the evidence in question?

2. If such objection was made, how is it that three New York State court's decisions were premised on the belief that such objection was not made? See 24 N.Y. 2d 666; 61 Misc. 2d. 250; and 36 A.D. 2d 761. Do these decisions mean that while objection was made, it was not adequate under New York law as it then was (Code of Criminal Procedure §815-d)? Explain.

3. If objection was made at trial but not before, and the failure to object prior to trial is not excused under §813-d (or, I suppose, if no objection were made at trial), is this case one of "deliberate bypass" of existing state remedies? (See, Fay v. Noia, 372 U.S. 391 (1963).

Both counsel responded to the Court's questions, in letters dated respectively February 24 and March 2, 1976. The Court, in its opinion, did not find that appellant's alleged failure to object prior to trial was unexcused, nor did it find this to be a case of "deliberate bypass."

ARGUMENT

POINT I

THE COURT BELOW ERRED IN HOLDING THAT APPELLANT'S OBJECTIONS AT TRIAL, ON DIRECT STATE APPEALS AND IN STATE CORAM NOBIS PETITIONS, RELATING TO THE INTRODUCTION OF THE PALMPRINT EVIDENCE, WERE INSUFFICIENT TO PRESERVE THAT ISSUE FOR FEDERAL HABEAS CORPUS REVIEW.

Appellant sought relief from the District Court after exhausting all possible state remedies by way

of direct appeal and collateral attack in the New York State courts. Appellant has continuously, and with sufficient clarity, presented his constitutional claims in his state court proceedings, but to no avail.* He therefore asserts that he has fully complied with the guidelines necessary to be entitled to habeas corpus relief under 28 U.S.C. §2254(b). See Picard v. Connor, 404 U.S. 270, 276 (1971); United States ex rel. Nelson v. Zelker, 465 F.2d 1121 (2d Cir. 1972); United States ex rel. Gibbs v. Zelker, 496 F.2d 991 (2d Cir. 1973).

The District Court's opinion rests on its erroneous belief that the decisions of the New York State courts (which refused to hear appellant's federal constitutional claims, either on direct appeal or collateral attack, because of state procedural requirements which were allegedly not followed) bar appellant federal habeas corpus review. This erroneous belief would perhaps be correct in the case of a litigant seeking review by certiorari from a state-court judgment, but is clearly not the rule where the federal constitutional claim is posited in the federal courts in a §2254 habeas corpus proceeding. Fay v. Noia, 372 U.S. 391, 436(1963).

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*/ Rather than repeat the procedural history of the case, we refer this Court to our Statement of Facts, supra, at pp. 7-10.

The decision of the Supreme Court in Fay v. Noia, supra, clearly set forth the view that Supreme Court certiorai review of a state-court judgment is much more circumscribed than §2254 habeas corpus review by a federal district court. After stating that the Act of February 5, 1867, extended federal habeas corpus powers to its constitutional maximums for state prisoners, the Court stated:

> Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.
>
> Fay v. Noia, 372 U.S. at 426-427, (emphasis added).

The Court went on to analyze and reject as erroneous the arguments advanced against the proposition that, for purposes of habeas corpus review, procedural rules must yield.

> But while our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter. The entire course of decisions in this Court elaborating the rule of exhaustion of state remedies is wholly incompatible with the proposition that a state court judgment is required to confer federal habeas jurisdiction. And the broad

> power of the federal courts under §2243 summarily to hear the application and to 'determine the facts, and dispose of the matter as law and justice require,' is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed. it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner. Re Medley, 134 US 160, 173, 33 L ed 835, 840, 10 S Ct. 384.
>
> Id., at 430-431, (emphasis of the Court).

Although the Court clearly recognized the need for the orderly administration of criminal justice and the need for the state to enforce their procedural rules upon defendants, it also realized that a person charged with a crime

> has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. Rogers v. Richmond, 365 US 534, 547,548, 5 L ed 2d 750, 770, 81 S Ct 735. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances

> is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary contrary to the Constitution. For these several reasons we reject as unsound in principle, as well as not supported by authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision.
>
> Id. at 433-434

The Court, of course, was not unmindful of the need for compliance in the state courts, and it went on to hold that "deliberate bypass" of procedures of state courts could forfeit a petitioner's rights to federal habeas corpus review. But such a finding would have to satisfy the standards of waiver set forth in Johnson v. Zerbst, 304 U.S. 458 (1937), namely, "an intentional relinquishment or abandonment of a known right or privilege." Id.at 464.

In the instant case, no such finding was made by the District Court, nor could it have so found. Appellant's trial counsel made objection to the introduction of the palmprint and fingerprint evidence as best as he could, given the rapidly-changing standards of

Fourth Amendment law at the time of appellant's trial.* Further, no "deliberate bypass" can be found herein, because the nature of the evidence, in the context of this purely circumstantial case, "pointed ineluctably to the defendant's guilt." People v. Gates, supra, at 669. For appellant to have deliberately bypassed the issue, in the speculative hope that it could later be raised, would have been a decision bordering on incompetence. In any event, a state-court finding of waiver does not bind the federal courts. The absence or presence of a waiver of federal constitutional rights is a question for federal courts. Fay v. Noia, supra, at 439.

* * *

It is clear that appellant's claim is ripe for federal habeas corpus review. The state courts have had a fair opportunity to consider appellant's constitutional claims. United States ex rel. Leeson v. Damon, 496 F.2d 718, 721 (2d Cir. 1974),

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*/ It should be noted that, at the time of appellant's trial, although such objections were futile and contrary to law as it existed prior to the Davis decision, they were nonetheless made by trial counsel. The trial court heard the objection, overruled it, and stated that the objection would continue for the record and would not have to be renewed by counsel (T.535-536).

citing Picard v. Connor, supra, at 276. Consideration of this claim would be permissible even if there were a question left open as to possible avenues available in the state courts, Kelleher v.Henderson, 531 F. 2d 78 (2d Cir. 1976).

Finally, this Court's recent decision in Cameron v. Fastoff, ___F.2d____, slip op.3369 (2d Cir. April 22, 1976), deciding an appeal of a district court denial of a habeas corpus petition, is most directly on point. In Cameron, the petitioner-appellants had not raised their federal constitutional claims until they sought certiorari from the Supreme Court after directly appealing their convictions in the New York State courts. The petitioner-appellants therein admitted that their failure to raise such constitutional claims was unjustifiable. This Court's holding in Cameron did not affirm the dismissal by the district court therein either on the grounds that there had been deliberate bypass or in grounds that failure to raise such claims precluded federal consideration, but rather it affirmed stating only that petitioners had failed to exhaust state remedies which might be available.

The facts in the case at bar are much more compelling than those in Cameron in that appellant herein had attempted to raise his claim at trial

even prior to the existence of specific federal case law authority to support that position, and has subsequently pursued all possible remedies in the state court.

For the reasons stated above, and specifically in order for the decision of this Court to be consistent with that of the panel in Cameron, the decision of the District Court must be reversed.

POINT II

THE INTRODUCTION AT APPELLANT'S TRIAL OF PALMPRINT EVIDENCE SEIZED SUBSEQUENT TO APPELLANT'S ARREST WITHOUT PROBABLE CAUSE, VIOLATED APPELLANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS.

The palmprint evidence which was used against appellant was taken in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution as interpreted by the Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961), and further clarified in Davis v. Mississippi, supra.

More than five years prior to appellant's arrest, the Supreme Court, in Mapp v. Ohio, supra, held that evidence obtained by a search and seizure in violation of the Fourth Amendment, that is, without a warrant or probable cause, is inadmissible in state court proceedings.

> We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.
>
> Mapp, supra, at 655, (emphasis added)

Although Mapp was held not to be retroactively applied [Linkletter v. Walker, 381 U.S. 618 (1965], the New York Court of Appeals held that any illegal seizure case still in the direct appellate process would be judged in light of the law as it existed at the time the appellate court was to rule:

> There can be no doubt that it is the duty of the State courts to follow the Mapp holding in all trials taking place after June 19, 1961. However, whether we are commanded to, and if not whether we should, apply it in pending appeals (see Griffin v. Illinois, 351 U.S. 12, 26; Great Northern Ry. Co. v. Sunburst Co., 287 U.S. 358, 363-366; Warring v. Colpoys, 122 F. 2d 642, cert. den 314 U.S. 678; 70 Harv. L. Rev. 83, 129), where, as here, the trial was completed and an intermediate appellate court has affirmed before Mapp was decided, is a threshold question in this case. To do so would likely result in the reversal of many convictions in pending cases, although the trials were free from error and conducted according to the law of this State and the interpretation of the Constitution by the Supreme Court of the United States as of the time of the trials.
>
> While it is the general rule that we give effect to the law as it exists at the time of our decision [Knapp v. Fasbender, 1 NY 2d 212, 243; Matter of Tartaglia v. McLaughlin, 297 N.Y. 419; Quaker Oats Co. v. City of New York, 297 N.Y. 527, 536; see, also, Vandenbark v. Owens-Illinois Co, 311 U.S. 538, 542-543], some of the members of this Court have felt that we are not required to, and should not, do so in the instant case particularly because of the language employed by the Supreme Court in Mapp at page 654-656, 658. The majority, however, are of the opinion that we should adhere to the general rule, and review defendant's conviction in light of the law as it presently exists.
>
> Holding then, as we do, that the Mapp rule is to be applied in our review of pending appeals from pre-Mapp convictions, we turn now to the question of whether on this record the narcotics introduced at defendant's trial were obtained as the result of an illegal search and seizure.
>
> People v. Loria, 10 NY 2d 368, at 370-371, 1962, (emphasis added)

The Supreme Court's decision in Davis, supra, makes it clear that fingerprints were included in and contemplated by

Mapp, and that Davis is not a new doctrine, but a mere clarification or extension of Mapp:

> To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes. Thus, in Mapp v. Ohio, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1089, 81 S. Ct. 1684, 84 ALR2d 933 (1961), we held that 'all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority inadmissible in a state court.' (Italics supplied.) Fingerprint evidence is no exception to this rule. We agree with and adopt the conclusion of the Court of Appeals for the District of Columbia Circuit in Bynum v. United States, 104 US App. DC 368, 370, 262 F2d 465, 467 (1958):
>
> 'True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed.'
>
> Davis, supra, at 724, emphasis added.

Thus, the District Court properly found that there was "no issue here of applying a new rule retroactively." (Opinion and Order of the District Court, dated May 27, 1976, at p. 2, f.n.2).*

It must be understood that under the existing New York case law, appellant was entitled to relief in the New York

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* The full text of the Opinion and Order is reproduced in Appellant's Appendix, at pp. A-4 through A-14.

Court of Appeals, even if, as that Court mistakenly believed, appellant had not objected at trial.* This argument is based on the Loria case, supra, which is identical to the situation here, in that the appellant in Loria was given the benefit of the Mapp decision even though his trial was held prior to the effective date of Mapp. See, People v. Loria , supra, at 370, and cases cited therein.

The New York Court of Appeals' erroneous reading of the record in appellant's case (i.e. that there was no objection to the introduction on evidence of appellant's prints, and that therefore it was not reviewable upon appeal because the prosecution was "deprived" of an opportunity to show what probable cause existed for appellant's arrest), cannot stand in the face of the trial record herein.

The Court of Appeals was indeed correct that there was no probable cause hearing below. The remedy, however, is not an affirmance of the conviction, thereby denying appellant's rights, but rather, a remand should have been ordered by the Court of Appeals, with a direction that an evidentiary hearing

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* Notwithstanding the New York Court of Appeals' opinion as to whether defense counsel objected to the admission of the fingerprints in evidence, the trial record is abundantly clear 1) that counsel objected and 2) that he objected on state and federal constitutional grounds and 3) that he objected specifically to the taking of petitioner's prints and 4) that the trial court entered a continuing defense objection as to any testimony relating to those prints. (T. 535-536).

be held on appellant's Fourth Amendment claim. When the State Court of Appeals did not grant such a hearing, appellant sought one by way of a state coram nobis petition, which was, in turn denied, and appellant then exhausted his state remedies by appealing from the denial of that petition.

Appellant then filed the petition for a writ of habeas corpus which is the subject of this appeal, seeking to have his federal constitutional claim resolved in the District Court pursuant to 28 U.S.C. §2254.

The appropriate remedy at this time is the vacatur of appellant's conviction and the granting of a new trial [(Morales v. New York, 396 U.S. 102 (1969)], or, in the alternative, the granting of a hearing to determine whether probable cause existed at the time of appellant's arrest.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND THE WRIT GRANTED, OR, IN THE ALTERNATIVE, THE MATTER SHOULD BE REMANDED FOR A HEARING.

Respectfully submitted,

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DATED: New York, New York
September 13, 1976

Counsel for appellant wishes to thank Steven Bernstein, law clerk, for his indispensable assistance in the preparation of this brief.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

STEVEN BERNSTEIN, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 90 Bedford Street, N.Y., N.Y. 10014

On September 13, , 19 76 , served the within Brief for Appellant

upon Hon Louis J. Lefkowitz attorney(s)

for Respondent-Appellee in this action, at

Two World Trade Center, New York, N.Y. 10047

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Steven Bernstein

STEVEN BERNSTEIN

Sworn to before me on
September 13, 19 76.

JESSE BERMAN
Notary Public, State of New York
No. 31-5290718
Qualified in New York County
Commission Expires March 30, 19 78